

No.: 63002-4

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I  
SEATTLE

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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WILLIAM BUTERBAUGH, an individual,

Appellant,

v.

CHARLES BOBO and JANE DOE BOBO, individually and the marital  
community therein,

Respondents.

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Appeal from King County Superior Court  
No. 08-2-31375-1 KNT

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**APPELLANT'S REPLY BRIEF**

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**ORIGINAL**

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Respondent's brief does little more by way of legal analysis than to assert superficially that defaults are not favored and that courts have broad discretion to vacate defaults. While claiming that he satisfied the CR 55 good cause standard to vacate the order of default, Respondent does not acknowledge CR 60 or the four factors set forth by controlling caselaw which must be shown to vacate a default judgment. In a transparent attempt to obviate the need to satisfy those factors, Respondent ignores (as did the trial court) the fact that a default judgment was entered. The trial court abused its discretion by vacating the default judgment without finding that the defendant had satisfied the requirements of CR 60.

### **ARGUMENT**

#### **A. THE TRIAL COURT ERRONEOUSLY VACATED THE DEFAULT JUDGMENT BASED ON CR 55's GOOD CAUSE STANDARD**

Respondent culls from a few cases remarks to the effect that default judgments are not favored. However, the rules are still in place and serve a recognized purpose:

In determining whether to grant a motion to vacate a default judgment, "the trial court must balance the requirement that each party follow procedural rules with a party's interest in a trial on the merits. *Showalter*, 124 Wash.App. at 510, 101 P. 3d 867. Although default judgments are generally disfavored in Washington based on an overriding policy which prefers that

parties resolve disputes on the merits, *Showalter*, 124 Wash. App. At 510, 101 P.3d 867 “we also value an organized, responsive judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.” *Little v King*, Wash.2d 696, 703, 161 P.3d 345 (2007). As our Supreme Court recently noted: “Litigation is inherently formal. All parties are burdened by formal time limits and procedures.” *Morin*, 160 Wash.2d at 757, 161 P.3d 956.

*Rosander v Nightrunners*, 147 Wash.App. 392, 403, 196 P.3d 711 (2008).

At no time did the trial court below determine that the Respondent had satisfied the requirements set forth in CR 60 for vacating a default judgment. Instead, the trial court expressly found that Respondent did not satisfy the “meritorious defense” requirement under CR 60, but held that CR 60 was inapplicable and vacated the default judgment for good cause only under CR 55. Ignoring the fact that default judgment had been entered, the court erroneously ruled that its earlier Order Denying Motion for Order Vacating Judgment entered on December 24, 2008 was in error because the motion to vacate the Commissioner's November 17, 2008 order did not require a showing of a meritorious defense but rather only "good cause." (CP 234). The trial court went on to state that there had been good cause to vacate the Commissioner's order of default under CR 55. CP 236. On that stated basis, the trial court reasoned that the order of default should have been vacated, and “[a]ccordingly, the Default

Judgment never should have been entered on December 12, 2008." CP 236.

In effect then, the trial court vacated the default judgment based on CR 55(c) rather than under CR 60(b). There is no case in Washington in which a court has vacated a judgment, by default or otherwise, on the basis of a good cause standard under CR 55(c). The trial court's decision in this regard was clearly in error based on a plain reading of the applicable rules. CR 55(c)(1) provides:

(1) *Generally*: For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, **if a judgment by default has been entered, may likewise set it aside in accordance with 60(b).**

CR 55(c)(1)(emphasis added). A valid default judgment had been in place for twelve days when it ruled on the motion for reconsideration. Accordingly, it was required to apply CR 60, and it failed to do so.

Washington case law clearly distinguishes between the standards for setting aside orders of default and default judgments:

The Superior Court Civil Rules provide different standards for setting aside orders of default and default judgments. CR 55(c)(1), CR 60(b); *Seek*, 63 Wash.App. at 271, 818 P.2d 618. Generally, an order of default may be set aside upon a showing of good cause. CR 55(c)(1). To establish good cause under CR 55, a party may demonstrate excusable neglect and due diligence. *Seek*, 63 Wash.App. at 271, 818 P.2d 618. Whereas, the requirements for setting aside a default judgment are (1) excusable neglect, (2) due

diligence, plus (3) a meritorious defense, and (4) no substantial hardship to opposing party. CR 60(b); *White v. Holm*, 73 Wash.2d 348, 352, 438 P.2d 581 (1968); *Canam Hambro Sys., Inc. v. Horbach*, 33 Wash.App. 452, 453, 655 P.2d 1182 (1982). In *Canam*, the court explained that, “[i]n contrast with CR 60(e), which requires that a defendant seeking to vacate a default judgment show a meritorious defense to the action, a party seeking to set aside an order of default under CR 55(c) prior to the entry of the judgment need only show good cause.” *Canam*, 33 Wash.App. at 453, 655 P.2d 1182.

*Estate of Stevens*, 94 Wash.App. 20, 30, 971 P.2d 58 (1999). In this case, the trial court side-stepped the requirements of vacating the default judgment under CR 60(b) by vacating the underlying default order under CR 55(c) and finding that the vacated default order had the effect of vacating the default judgment. CR 60(b) is meaningless if all default judgments can be vacated by way of vacating the prior default order under CR 55(c).

**B. GOOD CAUSE TO VACATE THE ORDER OF DEFAULT WAS NOT SHOWN**

Without analysis or explanation, in its ruling on the motion for reconsideration, the trial court stated that, in hindsight, the defendant had established “good cause” to vacate the order of default in his original motion to vacate. (CP 235-6) As noted, because a default judgment was then already in place, it was incumbent on the defendant to satisfy all the requirements under CR 60 rather than just good cause under CR 55(c) (1).

However, even if it was only incumbent on the Respondent to have shown “good cause” to vacate the default order and default judgment, he failed to show even that. It was error for the trial court to rule that, albeit in hindsight on reconsideration, that good cause had been shown without any support in the record.

On appeal, Respondent acknowledges the good cause standard for vacating orders of default in CR 55(c)(1). However, it is telling that he does not cite to any caselaw on the point, or acknowledge that it is well settled in the case law that the two factors to be considered in each instance to determine good cause are excusable neglect and due diligence. *Seek Systems v Lincoln Moving /Global Van Lines*, 63 Wash.App. 266, 271, 818 P.2d 618 (1991); *Estate of Stevens*, 94 Wash.App. 20, 30 (1999).

In bringing the original motion to vacate, Respondent did not refer to CR 55(c)(1) and did not refer to or attempt to show "good cause," excusable neglect or due diligence. Further, the sole evidence and argument put forward in the motion was to accuse plaintiff's counsel of mistake or fraud in representing to the court that he had effected proper service on the defendant when plaintiff's counsel was the one who served the defendant. (CP 107-9). This accusation was easily shown in the response to be unfounded in the law. (CP 127); *Roth v Nash*, 19 Wn.2d

731737 (1943). Because Respondent did not establish, or even attempt to satisfy the CR 55(c)(1) good cause requirement by evidence of excusable neglect or due diligence, it was error for the Trial Court to have vacated even the default order, much less the default judgment.<sup>1</sup>

The Respondent did not anywhere in the record below offer any evidence as to why he failed to appear or answer the complaint served on him. In fact, the defendant did not submit a declaration or any other evidence in connection with the motions.

Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment. It is thus an abuse of discretion.

*Little v King*, 160 Wn.2d at 706, 161 P.3d 345.

Instead, on appeal, Respondent lists seven different “factors” which are said to support the trial court’s determination of good cause, none of which is identified in any Washington case as criteria which support a finding of good cause to vacate a default order. Indeed, there is not the slightest of evidence bearing on excusable neglect in the record, or even a mention of the words “excusable neglect” below. Without a

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<sup>1</sup> The record is completely void of any declaration from the Respondent himself. He has provided no explanation whatsoever as to why he failed

showing of excusable neglect, neither an order of default nor a default judgment can be vacated. *Estate of Stevens*, 94 Wash.App. 20, 30 (1999). It was clear error for the trial court to have ruled on reconsideration that Respondent had established good cause to vacate the default order.

**C. THE TRIAL COURT’S DISCRETION IS DEFINED**

The trial court’s discretion in vacating judgments is broad. However, in doing so, the trial court must make take into account certain factors specified by the Washington Supreme Court. In *White v Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968), the Court explained:

The discretion which the trial court is called upon to exercise in passing upon an appropriate application to set aside a default judgment concerns itself with and revolves about two primary factors and two secondary factors which must be shown by the moving party. These factors are: (1) That there is substantial evidence to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party’s failure to timely appear in the action, and answer the opponent’s claim , was occasioned by mistake , inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after entry of default judgment; and (4) that no substantial hardship will result to the opposing party.

In failing to consider these factors, the trial court abused it’s discretion in vacating the default judgment. Despite clear caselaw and the unambiguous language of CR 55 (c)(1) requiring default judgments to be

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to timely respond to plaintiff’s lawsuit.

set aside in accordance with CR 60(b), Respondent maintains that the trial court has broad authority to vacate default judgments outside the parameters of CR 60(b). But this argument is neither founded upon any legal authority nor did the trial court indicate that it was relying on such broad authority in this case.

**D. RESPONDENT FAILED TO ESTABLISH A PRIMA FACIE DEFENSE**

Respondent argues that he established a prima facie defense to the plaintiff's claims for the first time in his motion for reconsideration. There are three distinct reasons that Respondent's argument on this point is untenable. First, the evidence he submitted was only in furtherance of an argument that the amount awarded in the default judgment was excessive and, even if such was shown, it does not constitute a prima facie defense. Second, even if a showing of an excessive damage award is sufficient to establish a "prima facie defense", Respondent failed to establish that the award was excessive. Third, the trial court specifically found that the defendant had not shown a meritorious defense.

Respondent quotes from and reads the case of *Little v King*, 160 Wn.2d 696, 161 P.3d 345 (2007) to allow for a defendant to set forth a prima facie defense by offering evidence that the amount of a default

judgment is excessive. The excerpt quoted from *Little* by Respondent is actually to the contrary. Indeed, a more accurate reading of the *Little* decision was offered in *Rosander v Nightrunners*, 196 Wash.App. 711, 719, 196 P.3d 711 (2006) as follows:

In *Little*, our Supreme Court held that a trial court abuses its discretion if it sets aside a default judgment solely because the “defendant is surprised by the amount or... the damages might have been less in a contested hearing.” 160 Wash.2d at 704, 161 P.3d 345. Rather, “[w]here a party fails to provide evidence of a prima facie defense ad fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise or excusable neglect, there is no equitable basis for vacating judgment.” *Little* 160 Wn.2d at 706, 161 P.3d 345, Nightrunners’ sole argument on damages is: “In light of the medical costs incurred and the injuries complained, it does not appear equitable or just for respondent to receive a judgment for general damages in excess of \$500,000.00.” Br. of Appellant at 29-30. This is not a prima facie defense to the damage award and falls squarely under the holding in *Little*, 160 Wash.2d at 705-06, 161 P.3d 345.

The *Little* and *Rosander* courts require that a prima facie defense be one that would defeat recovery, not just question the amount of the judgment.

In this case, Respondent does not dispute liability, does not deny that a collision occurred, does not deny that the plaintiff was injured, does not assert that the special damages were unreasonable, and offers no competent medical evidence to dispute the IME examiner’s findings. Respondent’s purported prima facie defense is that the amount awarded

under the judgment for general damages was unreasonable in light of the property damage. However, this defense is based upon pure speculation<sup>2</sup> and specifically rejected by the Supreme Court in *Little*, 160 Wn.2d at 704-705. Further, Plaintiff provided evidence that the plaintiff's car was struck directly on the rear spare tire, minimizing the visible damage. (CP 218) There is nothing in the record from the Respondent that states he felt little force from the impact. As held in *Little* and *Rosander, supra*, the fact that the plaintiff could receive lesser damages in contested hearing is not a prima facie defense. As such, Respondent failed to present a prima facie defense as required to vacate a default judgment.

Moreover, the amount of the judgment was not shown to be excessive. At the time of the IME, the plaintiff had already treated for fifteen months, and even the IME physician thought additional treatment was medically reasonable and necessary beyond that period. (CP 171)<sup>3</sup> At the time default judgment was entered, plaintiff continued to suffer from low back pain as a result of the accident with radiation into the left leg and

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<sup>2</sup> The wide range of jury verdicts (\$133 - \$280,000+) involving low property damage, motor vehicle accidents submitted by the parties illustrate how low property damage is not indicative of general damages. (CP 157-187, CP 204-216)

<sup>3</sup> Respondent's motion for reconsideration erroneously and incorrectly states that the IME took place just 3 months after the accident. (CP 153)

numbness and tingling in his left foot with prolonged standing. (CP 86) Plaintiff further stated that he experienced these symptoms on almost a daily basis, which interferes with his ability to work long hours, lift heavy objects, and to stand for long periods of time. (CP 86). Thus, Respondent failed to show that a \$129,000.00 general damages award for an injury that is deemed not yet medically fixed and stable 15 months post-accident with permanent residua is unreasonable.<sup>4</sup> Notably, the only ruling by the trial court regarding Respondent's effort to present a prima facie defense was that he failed to do so. (CP 149 and 245).

**E. TRIAL COURT CANNOT USE CR 60 TO CORRECT JUDICIAL ORDERS**

The case of *Shaw v City of Des Moines*, 109 Wn.App. 896, 37 P.3d 1255 (2002) does not, as Respondent claims, undermine the established rule that a trial court cannot vacate a judgment under CR 60(a) due to judicial error. Indeed in *Shaw*, the court noted the rule as follows:

CR 60(a) provides that “[c]lerical mistakes in judgments ... and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party[.]” The rule addresses clerical errors only; a court cannot use CR 60(a) to correct judicial error. *In re Marriage of Getz*, 57

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<sup>4</sup> Respondent also intentionally and improperly used prior settlement discussions he had with the plaintiff (prior to plaintiff counsel's involvement in the case) to support his defense. Upon plaintiff's motion, the trial court struck this inadmissible evidence from the record. CP 236.

Wash.App. 602, 604, 789 P.2d 331 (1990). The test for distinguishing between “judicial” and “clerical” error is whether, based on the record, the judgment embodies the trial court’s intention. *Id.*

*Shaw*, 109 Wn.App. at 901. In that case, CR 60(a) was applied to an error by a court clerk in issuing a Clerk’s Order of Dismissal, because he erroneously believed that the parties had failed to attend a LEPA hearing.

In this case, nothing in the record suggests that the default judgment did not embody the trial court’s intention at the time the judgment was entered. The default judgment was the judgment which the court made and intended to make upon the evidence as it was at that time. Plaintiff’s motion for entry of default judgment was noted for hearing prior to Respondent’s motion to vacate the default order. As such, the trial court ruled on plaintiff’s motion and entered judgment before hearing defendant’s motion to vacate the default order.

After reviewing additional evidence submitted by the defendant, the trial court claims that in “hindsight,” it made a mistake in entering default judgment prior to ruling on Respondent’s motion to vacate the default order. However, CR 60(a) can neither be applied to correct judicial error nor to vacate or modify a judgment in light of additional evidence offered post-judgment. *See Huseby v. Kilgore*, 32 Wn.2d 179

(1948) (Where judgment entered was in fact the judgment which trial court intended to enter based upon what trial court then believed the evidence showed, in absence of extrinsic fraud in obtaining such judgment, trial court could not thereafter vacate or modify it on ground that a witness for defendants had testified contrary to the facts or on ground that judgment as entered was not in fact the judgment of court.)

Some examples of “clerical error” are illustrated by the *Huseby* Court:

“But it is said that the court has inherent power to make its judgment speak the truth, and this it may do on its own motion at any time. The proposition as stated is no doubt true, but we cannot conceive that this is a case of that sort. If the court directs judgment for one party, and the clerk enters it for another, or if the court directs a certain judgment and another and different judgment is entered, doubtless the court can order its correction when the matter is brought to its attention; but the error must appear on the face of the record; the court cannot, in this manner, correct or modify a judgment entered in accordance with its directions.”

*Huseby*, 32 Wn.2d at 192. In this case, nothing in the record suggests that the default judgment was entered due to clerical error.

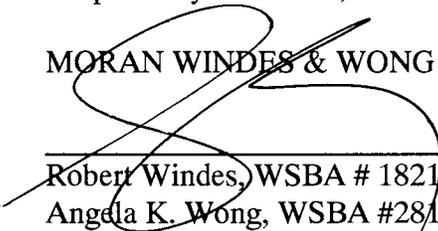
### **CONCLUSION**

While the trial court has broad discretion to vacate a default judgment, it must do so by applying CR 60 rather than CR 55. Accordingly, where, as here, the default judgment was vacated based upon

CR 55 and the defendant fails to provide evidence of a prima facie defense and fails to show that his failure to appear was occasioned by mistake, inadvertence, surprise or excusable neglect, there is no equitable basis for vacating the default judgment, and the trial court abuses its discretion in doing so. The Plaintiff urges the Court to remand this case for reinstatement of the default judgment in favor of the Plaintiff.

DATED this 14 day of June, 2009.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the Clerk of the Court via Legal Messenger and on the following counsel of record:

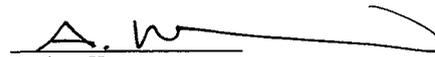
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 17 day of JUNE 2009.

  
Andrea Kato  
Legal Assistant

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